

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

JUNE 28 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2007-0060-PR
	)	DEPARTMENT A
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
CRYSTAL JEN VINDIOLA,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200500482

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF GRANTED

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Edward G. Rheinheimer, Cochise County Attorney  
By Cameron Udall

Bisbee  
Attorneys for Respondent

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Tucson  
Attorney for Petitioner

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V Á S Q U E Z, Judge.

¶1 In this case, we must decide whether the trial court had jurisdiction to grant the state relief in a defendant's post-conviction proceeding. For the reasons that follow, we conclude it did not and grant petitioner Crystal Vindiola relief.

¶2 Vindiola pled guilty at different times in four separate cases and was sentenced on the same day in all of them. She subsequently filed a notice of post-conviction relief in

this case pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., and appointed counsel filed a petition listing all four cases. In the petition, counsel raised two issues, one involving the trial court's imposition of a consecutive term of probation in another case and the other involving the proper amount of presentence incarceration credit to which she was entitled in that case and another one. Counsel expressly stated Vindiola did not dispute the amount of presentence credit in this case and raised no other issue related to this case.

¶3 In its response, the state agreed Vindiola was entitled to credit in the two cases and disputed her claim about the probation term. But the state also asserted in passing that Vindiola should not have been awarded 180 days' credit in this case. The trial court granted Vindiola relief on her claim in the two other cases although it awarded her less credit than she had sought. The court also rejected the state's assertion about the amount of credit awarded in this case, finding the state had waived the issue by not raising it at the sentencing hearing.

¶4 The state then moved for reconsideration of the ruling, which the trial court deemed a motion for modification of sentence. After Vindiola filed a response, the court granted the motion. The court denied Vindiola's subsequent motion for reconsideration, and this petition for review followed.

¶5 As the state has repeatedly noted in this proceeding, "[i]t is the *responsibility of the State* to challenge any incorrect pre-sentence incarceration credits by appeal or by appropriate post-trial motion." When a defendant pleads guilty, he or she may only challenge a conviction or sentence through post-conviction proceedings. *See* Ariz. R. Crim. P. 32. But, under the plain language of the rule, post-conviction proceedings are clearly

available only to defendants, not the state. *See* Ariz. R. Crim. P. 32.1 (“Subject to the limitations of Rule 32.2, any person who has been convicted of, or sentenced for, a criminal offense may, without payment of any fee, institute a proceeding to secure appropriate relief.”); *see also* A.R.S. § 13-4033(B) (defendant in noncapital cases who pleads guilty or admits probation violation may not appeal).

¶6 The state’s right to appeal is instead governed by A.R.S. § 13-4032. Among the orders and rulings the state may expressly appeal from is “[a] sentence on the grounds that it is illegal.” § 13-4032(5). Therefore, despite its failure to object, the state could have appealed to challenge the number of days awarded. But it did not file any appeal, first raising the issue instead in its response to Vindiola’s post-conviction petition.

¶7 As the state notes, it could have asked the trial court to correct the credit it had awarded Vindiola by a post-judgment motion to modify the sentence, filed pursuant to Rule 24.3, Ariz. R. Crim. P., 17 A.R.S. Such a motion, however, as the state has also pointed out, must be filed “within 60 days of the entry of judgment and sentence but before the defendant’s appeal, if any, is perfected.” *Id.* Because Vindiola was sentenced on December 27, 2005, the sixty-day period ended on February 25, 2006, long before the state filed its motion for reconsideration on October 25.

¶8 Nor was the state’s motion timely as a motion for reconsideration in the post-conviction proceeding, as the state insists. A motion for reconsideration addresses alleged errors in a trial court’s ruling on issues already raised; it cannot serve as a vehicle to raise new issues. *See* Ariz. R. Crim. P. 32.9 (party “aggrieved by a final decision of the trial court” may file motion for rehearing). Accordingly, we find no merit to the state’s claim that

it was aggrieved by the trial court's rejection of its assertion of error in its response to Vindiola's post-conviction petition.

¶9 Finally, rather than supporting the state's position, we find *State v. Lee*, 160 Ariz. 323, 772 P.2d 1176 (App. 1989), supports Vindiola's position. There, the trial court issued an order attempting to correct its error in awarding the defendant presentence incarceration credit. *Id.* at 323, 772 P.2d at 1176. But, because it did so after the defendant's conviction had been affirmed on appeal, Division One of this court held the trial court had lacked jurisdiction to do so. *Id.* at 323-24, 772 P.2d at 1176-77. Noting the state could have challenged the error either in a post-trial motion under Rule 24.3 or on appeal but had not, Division One ruled the error must stand. *Id.* at 324, 772 P.2d at 1177.

¶10 We conclude the state failed to timely invoke the trial court's jurisdiction to address any error in the presentence incarceration credit award in this case. Accordingly, we grant review and grant relief, vacating the trial court's orders granting the state relief on its motion for reconsideration and denying Vindiola's motion for reconsideration.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge